United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7695

United States Court of Appeals

FOR THE SECOND CIRCUIT

DAWN DONOHUE, an infant by DOROTHEA DONOHUE, her Mother and Natural Guardian, and DOROTHEA DONCHUE individually,

Plaintiffs-Appellants,

against

ALBERT RAPELLA,

Defendant-Appellee.

On Appeal from the United States District Court For the Southern District of New York

BRIEF SUBMITTED ON BEHALF OF PLAINTIFFS-APPELLANTS

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Statement

The Plaintiffs-Appellants appeal from the Order of Hon. Milton Pollack, District Judge, Southern District of New York, dated November 21, 1975, dismissing the complaint for lack of jurisdiction. The Court, in its Order, held that the Plaintiffs-Appellants at the time of the commencement of the action were residents in and citizens of the

State of New Jersey and hence, diversity of citizenship is lacking.

The Court below was in error in its conclusion, there being no proof before the Court of any change of intent on the part of the Plaintiffs-Appellants to make themselves citizens of the State of New Jersey. Admittedly, the Defendant-Respondent is a resident and citizen of the State of New Jersey. The Court below permitted the error to occur in failing to distinguish between "residence" and "citizenship". Jurisdiction was claimed under Title 28, §1332 U.S.C. and upon Federal Specification DD-G-451c and Standards of the Federal Housing Administration.

Title 28, §1332, in allowing jurisdiction to a District Court, speaks of "Diversity of Citizenship". Judge Pollack in his Order made a finding that the Plaintiffs-Appellants were *both* residents and citizens of the State of New Jersey at the time of the commencement of the suit. Doubtless, Judge Pollack knows the distinction between "residents" and "citizens". However, the inclusion of both these words in his Order is some evidence of the blurring that the human mind is prone to, when confronted, at first blush, with the physical fact that the Plaintiffs-Appellants were, in fact, residing in New Jersey. "Citizenship" alone is required under the Rule.

Substantial, if not total proof was offered to show (1) that the residence in New Jersey was on a continuing temporary basis to enable the infant Plaintiff, Dawn, age 8, to be in close proximity to the attending surgeon who had fortunately been present in the Hospital when the child was taken there by ambulance, and (2) the parents of the infant plaintiff, along with other members of the immediate family had resided at 120 West 91st Street in the Borough of Manhattan for eight years (p.

60a) and before that had resided at 170 West 89th Street in the Borough of Manhattan for ten years (p. 60a); that the infant plaintiff Dawn, age 8, was attending P.S. 84 located at 32 West 92nd Street in the Borough of Manhattan and that her sister, Patricia, age 10, was attending the Parochial School of St. Gregory's located at 131 West 91st Street in the Borough of Manhattan. In these two addresses, the parents of the infant plaintiff Dawn resided a total of *18 years*. These addresses are precise and were given to the attorneys for the Defendant-Respondent long before the Motion for Dismissal was made. In other words, if there was any doubt about these addresses, proof could easily have been offered to show that the parents did not reside there.

The accident

On July 29, 1973 at about 1 P.M. while the infant Plaintiff Dawn, age 8, was standing on the porch of the premises, 319 McCabe Avenue, Bradley Beach, New Jersey, facing the large glass storm door which her sister Patricia, age 10, was attempting to open from the inside, the large section of glass fell from the insert of the door. Large pieces and shards struck the infant Plaintiff, Dawn, severely cutting the left wrist and hand with great loss of blood.

The infant Plaintiff suffered deep lacerations resulting in the severance of all of the tendons and nerves of the left hand and wrist. She was rushed to the New Jersey Shore Medical Center-Fitkin Hospital where she was operated upon by Dr. Joseph E. Jasaitis at midnight of the same day, as she had eaten dinner in the emergency room. The operation took several hours. The hospital chart shows that the infant plaintiff suffered complete transsection of the

(1) ulnar nerve

(2) hemi-transsection of the median nerve

(3) lacerations of the long flexor tendons of index, middle, ring and little fingers (pp. 231a, 232a).

After surgery was completed, the child was left with a "claw" like hand which she could not close. It was the providential presence of Dr. Jasaitis, a specialist in hand surgery and reconstruction at the time of the child's admission to the hospital that prompted the mother of the infant plaintiff to take up residence in New Jersey which was to be temporary, commencing in November 1973.

From the date of the onset of the accident and terrible trauma that left this left-handed child with a totally disabled left hand with claw-like disfigurement on July 29, 1973 until the end of November 1973, the Plaintiff-Appellants resided in their home at the Stephen Wise Towers of the New York City Housing Authority, located at 124 West 91st Street in the Borough of Manhattan, City of New York (Exhibit B, p. 240a). In other words, the Plaintiffs-Appellants returned to their home in New York City and made frequent visits to Dr. Jasaitis in New Jersey. It was this unfortunate accident to the child that required the mother and child to live temporarily in New Jersey as they no longer could pay for the transportation to be near Dr. Jasaitis, whose great skills and specialty had enabled almost a miracle to be performed on Dawn's left hand and wrist. However, Dr. Jasaitis, during the follow-up visits informed the mother that a further operation would be warranted if the restrictions continued and the swelling in the wrist did not disappear. It was these factors alone, namely, to be near Dr. Jasaitis, the specialist in cosmetic hand surgery and reconstruction that brought about the temporary residence of the Plaintiffs-Appellants in New Jersey.

Proof of Citizenship in the State of New York

To enable the Court to quickly discern the proofs positive, that the Plaintiffs-Appellants were at all times, citizens of the State of New York, (1) prior to the accident, (2) following the accident and (3) at the present time, a chronological follow-up will be respectfully pointed out in simple references to the Joint Appendix, viz.:

1. The Plaintiffs-Appellants resided with the husband-father William Donohue and other members of the family at the time of the accident on July 29, 1973 at Stephen Wise Towers, New York City Housing Authority, 120 West 91st Street in the Borough of Manhattan for a period of 7 years (p. 4a).

2. Previous to the residence at 120 West 91st Street, the Plaintiffs resided at 160 West 89th Street for ten years (p. 4a).

3. The husband and father of the Plaintiffs-Appellants, William Donohue, was employed as a licensed operating engineer on construction work in New York City (p. 222a) and was at the time of the accident and for many years prior, a member of the International Union of Operating Engineers, Locals 15, 15A, 15B, 15C, 15D, AFL-CIO (pp. 4a-5a) located at 265 West 14th Street, New York, New York.

4. That the Plaintiffs-Appellants were at the time of the accident and for many years prior thereto, members of the Roman Catholic Church of St. Gregory located at West 90th Street and Amsterdam Avenue in the Borough of Manhattan, City of New York p. 5a).

5. The infant Plaintiff-Appellant, Dawn Donohue attended at the time of the accident P.S. School

84 located at 48 West 90th Street in the Borough of Manhattan; the sister of Dawn was Patricia, age 16, attended St. Gregory's Parochial School on West 90th Street in Manhattan (p. 5a).

6. The married daughter and sister of the Plaintiffs-Appellants, namely Mrs. Catherine Horgan, and her husband, resided as summer residents at 319 McCabe Avenue, Bradley Beach, New Jersey (p. 6a).

7. The summer cottage at 319 McCabe Avenue, Bradley Beach, N. J. was a 2 family unit, the upper portion being rented by Mrs. Hogan and her husband (p. 7a).

8. The infant Plaintiff, Dawn, at the time of the accident on 7/29/73, had completed second grade at P.S. 84 located at 48 West 90th Street and was to enter third grade (Answer to Interrogatories p. 31a).

9. A brother of the Plaintiff-Appellant, Dawn, by the name of Stephen Donohue, attended St. Gregory's Parochial School on West 90th Street and thereafter attended the Manhattan Trade School in Yorkville, in the Borough of Manhattan until he joined the U. S. Marines, continuing his residence as of 120 West 90th Street, New York City (p. 39a).

10. The parents of the infant Plaintiff Dawn, voted in New York City and were never registered to vote in New Jersey (p. 41a).

11. The Plaintiff-Appellant Dorothea Donohue evidenced her intent to return to New York City and stated in her deposition that she was residing temporarily in New Jersey (p. 55a).

12. The Plaintiff-Appellants-Appellants were residing in New York City and because of the problem of "too much traveling back and forth" the mother moved to Stockton, New Jersey (p. 58a).

13. The Plaintiffs-Appellants remained for a month (July to August 1973) with the married daughter and then returned to their New York home at 120 W. 91st Street, Manhattan (p. 59a).

14. In September 1973, about 2 months following the accident of July 29, 1973, the Plaintiffs-Appellant Dawn Donohue resumed school at P.S. 84 in Manhattan while sister Patricia resumed school in St. Gregory's Parochial School in Manhattan (pp. 60a-61a).

15. The mother, Plaintiff-Appellant Dorothea Donohue, in her deposition stated she intended to vote in New York when she moved back to New York (p. 62a).

16. Neither the Plaintiff-Appellant Dorothea Donohue nor her husband ever owned property in New Jersey (p. 65a).

17. The husband and father of the Plaintiffs-Appellants William Donohue was working in New York when the Plaintiffs-Appellants visited their married daughter, Mrs. Horgan, in Bradley Beach, N. J. (p. 68a).

18. The presence of the Plaintiffs-Appellants at the summer cottage of Mrs. Horgan was that of temporary guests (p. 69a).

19. The tenant on the first floor of the summer cottage in Bradley Beach, New Jersey was a Mrs. Rose Tucci, a friend of the Plaintiff-Appellant Dorothea Donohue, who came from the same neigh-

borhood of West 90th Street in Manhattan and whose little boy also attended P.S. 84 where the infant Plaintiff-Appellant Dawn attended. (This coincident is mentioned here as part of the overall picture of demonstrating that the residence in Bradley Beach of the Plaintiffs-Appellants was limited to a visit to the married daughter, for Mrs. Tucci later returned to New York City and her address was given to the attorneys for the Respondent (p. 71a) and the manner in which Mrs. Tucci became a tenant for the summer in this cottage was through Mrs. Horgan who asked the Respondent Albert Rapella if the apartment would be available (p. 72a).

20. At the time Mrs. Donohue visited her daughter at Bradley Beach she continued to be a tenant at 120 West 91st Street, Manhattan (p. 97a).

21. The husband and father of the Plaintiffs-Appellants up to November 1973 was working on construction in New York City and never worked in New Jersey (p. 98a).

22. The Plaintiffs-Appellants never lived in New Jersey, prior to the visit in July 1973 (p. 99a).

23. The Plaintiff-Appellant Dorothea Donohue testified on her deposition that she never lived in New Jersey prior to the visit to her daughter; that her husband continued to be employed in New York and that the reason she remained in New Jersey was to be near Dr. Jasaitis who was the attending surgeon for the severely traumatized infant Plaintiff-Appellant Dawn Donohue (pp. 100a, 101a).

24. When the father of the Plaintiff Dawn Donohue retired, he retired from work in New York, and upon retirement never worked in New Jersey nor

prior thereto (p. 107a). His Union affiliation for over 20 years permitted him to work in its jurisdiction only which were the five Boroughs of the City of New York.

25. The Plaintiff-Appellant Dorothea Donohue in her deposition stated that she and her husband were registered to vote in New York City in 1972 which was the last registration for voting in New York; that she and her husband last voted in New York in 1972 and that they planned to vote in November 1973 except he got sick (p. 123a) and daughter Dawn was severely injured.

26. The Plaintiff-Appellant Dorothea Donohue in her affidavit in opposition to the Motion to dismiss the complaint for lack of jurisdiction stated that she and her husband were married on September 15, 1948 and took up residence in Sullivan County, New York for two years and thereafter moved to Queens and then to Manhattan in the neighborhood of West 90th Street and Amsterdam Avenue; that most of her children were baptized and received their first communion and confirmation at St. Gregory's Church and each of the children attended St. Gregory's Parochial School in Manhattan with the exception of Dawn who attended P.S. 84 on West 90th Street (pp. 200a-201a).

27. Mrs. Donohue in her affidavit stated that it was the desperate need to have this highly skilled surgeon and dedicated doctor treat Dawn for the terrible injury she suffered and to be near his office for treatments that caused her to move temporarily to New Jersey that in the beginning she brought Dawn to his office on August 7th, August 28th, August 30th, September 14th, October 9th, No-

vember 1st, December 1st, December 19th, December 28th, 1973 and January 6th, 1974 (p. 204a). During the visits to Dr. Jasaitis from July to November 1973, the Plaintiffs-Appellants resided in Manhattan at the Stephen Wise Towers of the New York City Housing Authority on 124 West 91st Street and was compelled to make these long journeys with Dawn.

28. Mrs. Donohue stated that her home was in New York City for 27 years since her marriage and that when the second operation was performed by Dr. Jasaitis, she would then move back to New York.

29. Mrs. Donohue stated that she was a member of the Local Election Board located in the Public School adjoining St. Gregory's in Manhattan (p. 207a).

30. Mrs. Donohue in her affidavit at Page 209a stated that she visited her mother-in-law, Mrs. Margaret Donohue in Middle Village, Borough of Queens, New York, about a month and a half prior to the date of the deposition and at that time made inquiries of friends to have real estate agents look for a home for her and her family in New York; Mrs. Donohue stated that she wrote to a friend, Mrs. Dorothy Hollohan of 117 West 90th St., New York City to look for an apartment for her (p. 208a).

31. The bill of Dr. Jasaitis for the operation performed on Dawn on July 29, 1973 was sent to the Manhattan address of the Plaintiffs-Appellants at 120 West 91st Street which is probative proof that the Plaintiffs-Appellants regarded New York City as their home (p. 209a).

32. The bill of Dr. Jasaitis is Exhibit 2 and is addressed to the husband of the Plaintiff-Appellant Dorothea Donohue at 120 West 91st Street, New York City (pages 209a, 213a).

33. Exhibit 2 at page 211a is a letter addressed to the Plaintiff-Appellant Dorothea Donohue offering her the apartment which she occupies. This person is Plaintiff-Appellant Dorothea Donohue's cousin "Fran" (Frances). She also speaks of an apartment which was available on East 87th Street in Manhattan as to which the writer says Mrs. Donohue "can't do better" (p. 212a).

34. The first bill of Dr. Jasaitis was paid by the Joint Welfare Fund of the Operating Engineers, Locals 14-15, 265 West 14th Street, New York, N.Y. in a check for $112.50 as the same appears at P. 214a; a further bill was paid to the Jersey Shore Medical Center, in the sum of $576 per the letter of the Trustees of the Joint Welfare Fund of Local Unions 14-15, International Union of Operating Engineers, 265 West 14th St., New York City of which the husband and father of the Plaintiff-Appellants, William Donohue was a member (Exhibit 4, p. 215a). Here is proof that the New York based Union of Mr. Donohue regarded him as a New York resident.

35. The address on the Police Blotter Record of the Police Department of Bradley Beach, New Jersey at the time of the accident shows the address of the infant Plaintiff Dawn as 120 West 91st Street, New York City, Apartment No. 19 (p. 241a, Exhibit "C").

36. Exhibit "B" being the bill of the Stephen Wise Towers of the New York City Housing Authority shows the Plaintiffs-Appellants residing

through November 1973 at 120 West 91st Street, Manhattan, despite the facts that the accident occurred on July 29, 1973. This evidences an intent to continue to regard New York as their home.

37. The letter of the Plaintiff-Appellant Dorothea Donohue addressed to her attorney, William J. Corcoran, Esq. postmarked March 7, 1975 is proof of the intent of Mrs. Donohue to return to New York City to live as she stated in her letter which was mailed before the Notice of Motion to dismiss was made or received. In this letter Mrs. Donohue repeats the reasons why she has to stay in New Jersey, namely to be near Dr. Jasaitis and because of the likelihood of another operation on Dawn's hand.

38. The receipt of the New York Housing Authority indicates partial payment of the rent for the premises 120 West 91st Street in August 24, 1973 (p. 242a).

39. The hospital chart of the Jersey Shore Medical Center-Fitkin Hospital on the admission page gives the address of the infant Plaintiff-Appellant as 120 West 91st St., NYC (p. 231a).

40. The emergency chart of the above hospital gives the name and address of the father of the infant plaintiff-appellant as "William Donohue, 120 W. 91st Street, NY City and occupation as "operating engineer", Local No. 15.

This continuing consistent proof that the infant plaintiff-appellant's address remained in New York City and that the father continued to be a member of Local 15 of the Operating Engineers Union in New York City (233a of Joint Appendix).

The above items of proof evidencing that the Plaintiffs-Appellants were residents and citizens of New York were also made at a time when the question of "citizenship" was not considered or contemplated; that the addresses given as being in New York were given before any suit was commenced or contemplated and prior to the time that the Plaintiffs-Appellants consulted an attorney.

All of the above pieces of evidence, when put together spell out a continuing intent on the part of the Plaintiffs-Appellants to return to New York; the proof shows that from the very beginning, when they made a summer visit to the married daughter in Bradley Beach it was the intent of the Plaintiffs-Appellants to return to New York and, in fact, they did, for they continued physically to reside at 120 West 91st Street and the children Patricia and Dawn resumed school at St. Gregory's Parochial School and P.S. 84 respectively. These pieces of evidence are cogent proof that Mr. and Mrs. Donohue and their infant children intended to return to New York; that they never worked in New Jersey; never voted in New Jersey; that Mr. Donohue up until his total diability, sometime in November 1973, continued to work for construction contractors in New York City and that his Welfare Fund paid for the Hospital and Medical expenses of the doctors attending the infant Plaintiff-Appellant Dawn; that his membership in this Operating Engineers Union permitted Mr. Donohue to work only in the Five Boroughs of New York City which was and is the territorial jurisdiction of Locals 14 and 15 of the Operating Engineers Union; in other words if there was work in New Jersey, Mr. Donohue could not qualify for work in New Jersey as his Union membership was limited to the New York City Local Union 15.

The above proof makes a pretty persuasive argument that the Plaintiffs-Appellants at all times regarded New York State as their place of domicile, notwithstanding their temporary residence in the State of New Jersey for good and sufficient reasons.

POINT I

Intent in establishing domicile overrides the accidental postures of residence, no matter for how long such accidental postures continued.

It has been often stated that a person may have many residences but only one domicile. A person such as the late J. P. Morgan had a home in Paris, a shooting abode on the moors of Scotland, a mansion in the Murray Hill section of New York City and a magnificient estate in Glen Cove, Long Island, and which is now the site of the Soviet Consulate General, and a winter home in Palm Beach, Florida. Yet, when the estate was probated, it was found that Mr. Morgan intended his home in Glen Cove to be his domicile and hence, the estate was probated out of the Surrogate's Court of Nassau County.

This, of course, is elementary law which is not offered to this Honorable Court as something startling or new. However, it is offered as a prelude to what is perhaps one of the most lucid interpretations of the difference between domicile and residence in the case of *Broadstone Realty Corp.* v. *Thomas Mellon Evans,* 213 F.Supp. 261 (1962). (The decision was written by Judge Edelstein) (now Chief Judge Edelstein).

At Page 265 the Court says:

> "It is well established that with respect to the diversity jurisprudence of the Federal Courts, citizenship has the same meaning as domicile. It imports permanent residence in a particular State with the intention of remaining . . . Residence alone is not equivalent of citizenship, although the place of residence is prima facie the domicile and citizenship is not necessarily lost by protracted absence from the

home where the intention to return remains. *Stine* v. *Moore* 213 F. 2d 446 and other cases cited."

At Page 265 Judge Edelstein continues:

"A person may have several residences and can change his residence at will but domicile, once established, so remains until a new domicile is legally acquired. *Mezzich* v. *Southern Pennsylvania Bus Co.*, 59 F. Supp. 799 (Ed. Pa. 1945). The purchase or lease of a new residence for conveniences or for the purpose of making working conditions tolerable does not, without more, indicate a change in domicile. *Earley* v. *Hershey Transit Co.*, 55 F. Supp. 981 (MD PA 1944)."

Again, at page 265:

"The acquisition of a new residence for occupancy during employment away from a permanent home is insufficient to rebut that presumption * * * voting is an important consideration in determining domicile."

See *Wilson* v. *Republic Iron Co.*, 257 U.S. 92.

Continuing at page 266:

"as there is no statutory directive for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial Court. *Gibbs* v. *Buck*, 307 U.S. 61 * * * the Trial Court may, in its discretion, hear and determine issues of fact as to jurisdiction by receiving oral testimony and other evidence. *Gilbert* v. *David*, 233 U.S. 561, at 566, 568 or by receiving and weighing affidavits."

The Court is respectfully requested to view the case of *Gallagher* v. *Philadelphia Transportation Co.*, 185 F2d

543 (3rd CA). The question there is whether the Plaintiff is a citizen of Pennsylvania or Oregon within the meaning of Section 1332 of the Judicial Code, 28 USCA 1332. This latter section, of course, sets forth the possibilities that may cause a claim to be Diversity of Citizenship and for brevity will not detail here those areas. The fact situation in *Gallagher* v. *Philadelphia Transportation Co. supra* is interesting insofar as the probing of intent on the part of the wife in that case is concerned. Her husband was serving a sentence for a felony in a prison in Pennsylvania. The wife and her two children came to Philadelphia from California in 1944. In her suit for personal injuries the wife claims she was a citizen of Oregon. She at no time returned to Pennsylvania except for the purpose of the trial of her case. She left no business interests or property in Pennsylvania. She retained no residence there. She had not visited her husband at the place of his incarceration in Pennsylvania since her removal to Oregon in 1947.

Upon removing to Oregon she was uncertain whether she would remain there or remove to California. She also considered the possibility of returning to her husband when he was to be released from prison and finally she expressed her intention to make Oregon her home although she used the word "visit" to her brother.

The District Court found that she was a citizen of Pennsylvania at the date of the commencement of the suit on July 9, 1945 and that Plaintiff entertains fixed intention to return to Philadelphia and remain there permanently as soon as conditions make it, in her opinion, desirable. The District Court said in its findings of fact the applicable rule of law to be that domicile may be changed by personal presence in the new State and an "abiding intention to make it home". Her residence could not be changed without an abiding intention at a particular place

elsewhere. The Court found that such an intention was never formulated by Plaintiff; the District Court found that the Plaintiff never formulated an intention of residing permanently in California or Oregon [illegible]ny other place but intended to and now intends to [illegible]side permanently in Pennsylvania.

The Third Circuit remanded the case to the District Court because the District Court set too high a standard for Plaintiff; she has the burden to prove that the Court has jurisdiction once this is challenged; the Circuit Court stated it was not sure her proofs would not have met this burden. See *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178.

The Third Circuit held that the District Court in using the word "abiding" used it in the context of "permanently" and that Plaintiff has had an affirmative intention to permanently attach herself to Oregon or California.

At Page 546, the Third Circuit held:

> "The emphasis of the court on permanence of the anticipated attachment to a State in our opinion, required too much of the Plaintiff."

On the other hand, the Court at Page 546 said the correct standard is

> "The negatively stated proposition is correct, viz: that it is the absence of an intention to go elsewhere which is controlling."

See

Gilbert v. *David*, 255 U.S. 561 (1915);
Williamson v. *Osenton*, 232 U.S. 619 (1914);
Williams v. *North Carolina*, 317 U.S. 287.

The Court noted that it is "enough to intend to make the new State one's home"—Restatement of Conflict of Laws, Section, 19, 20.

At Page 547 the Third Circuit stated:

> "It is true that many cases have used the word Permanent in explaining the requisite intention. But we doubt that these cases actually required so much —In view of this fact, we think it is proper for us to insist that the District Court apply clearly what older precedents may have applied with less precision."

See also the case of *Brough* v. *Strathmann Supply Co.,* 358 F2d 374 (CA Pa. 1966), where the rule is laid down that a change in circumstances after suit commenced will not divest the Federal Court of Jurisdiction.

Pappas v. *Moss,* DC NJ 1966, 257 F.Supp. 345 reversed on other grounds 393 F.2d 865.

The Circuit Court for the Second Circuit held that domicile on which citizenship is based consists of residence in fact coupled with a purpose to make the place of residence, home. See *Nick C. Spanos* v. *Skouras Theatre,* 364 F2d 161 (1966).

The Supreme Court held that an old domicile continues until there is positive intention to create a new home. *Texas* v. *Florida,* 306 U.S. 398, 59 S.Ct. 563 (1939). Again the Circuit Court for the Second Circuit in two decisions, held that moving to another state for the express purpose of establishing diversity is sufficient to establish that domicile as bona fide. In the case of *Peterson* v. *Allcity Insurance Co.,* 472 F2d 71 (1972), the Court of Appeals for the Second Circuit reviewed the decision of Judge Judd in the Eastern District rendered in favor of the assignee of the insured against the Insurance Carrier for "bad

faith" failure to settle the claim within the limits of the automobile liability policy. The Appellant Insurance Carrier contended that the Plaintiff was not, in fact, a bona fide resident of North Carolina thus destroying the diversity of citizenship and the jurisdiction of the Federal Court. The Appellant Insurance Carrier asserted that both it and the appellee are New York residents.

The Circuit Court held that even though at the time of trial in a prior state action involving the accident, the appellee was a domicile of Brooklyn, New York, her intention plus her removal to North Carolina for the express purpose of making it her domicile is sufficient to establish that domicile as bona fide.

Judge Mulligan held that a collateral aspect of her move concerned her intention to have done such for the sole purpose of obtaining diversity of citizenship is immaterial. The Court held the rule of the case to be:

> "Intention to change domicile plus asportation to that domicile is sufficient to establish proper intention."

In the case at bar, there is not a scintilla of evidence that the Donohue family had an "intention to change domicile". Hence Judge Mulligan's definition of the Rule is not met despite asportation to New Jersey.

In the celebrated case of *Williams* v. *North Carolina*, 317 U.S. 287 (1942), a man and woman from North Carolina went to Nevada for the purpose of establishing residency and a divorce under Nevada law. Subsequently they marry and return to North Carolina where they are prosecuted and convicted of bigamy.

The Supreme Court assumed the domicile established by the parties in compliance with Nevada law was not a sham, there being no evidence to indicate such. The

Court distinguishes between two sets of circumstances and doesn't rule on either:

> (1) the obligation of a state to grant full faith and credit to sister state divorce decrees granted to a resident as distinguished from a domicile.
>
> (2) Whether North Carolina can refuse to grant full faith and credit because she decides the domicile was not bona fide.

The basis of the decision is the Court's belief that rules with regard to marital relationships are the proper interest of the state granting the decree and should not be interferred with unless a federal policy was contravened.

In the case of *Gilbert* v. *David,* 235 U.S. 561, the Supreme Court adopted two text book definitions of diversity:

> (1) The absence of any present intention to not reside permanently or indefinitely in the new abode.
>
> (2) If a person has actually removed to another place, with an intention of remaining there for an indefinite time and as a place of fixed present domicile, it is to be deemed his place of domicile notwithstanding he may entertain a floating intent to return at some future period.

In the case of *Texas* v. *Florida,* 306 U.S. 398, the Supreme Court undertook to give some guidelines in helping determine the factual issue of domicile. With regard to whether a dwelling place is a person's home, consideration should be given to the following:

At page 414:

1. Its physical characteristics.
2. The time spent there.

3. The things done therein.

4. The persons and things therein.

5. Mental attitude towards the place.

6. Intention when absent to return to the place.

7. Elements of other dwelling places of the person concerned.

The above facts and characteristics of the domicile of the Donohue family are described earlier in this memorandum, viz: long residence, twenty years employment, childrens' attendance at New York City schools, regular voting habits of the Donohues in New York City, versus, the absence of any of the above occurring in the State of New Jersey.

POINT II

The objective evidence in this case supports a continuous intent on the part of the Plaintiffs-Appellants to physically return to New York when the reason for their stay in New Jersey has been satisfied.

Apart from the life style of the Plaintiffs-Appellants including the other children and husband which all point to their adherence to New York as their place of domicile for over 25 years, there are other cogent objective pieces of evidence which support the continuous intent, never surrendered, to return to New York.

To begin with we have the following:

(1) uninterrupted residence and domicile in New York State and New York City, beginning in 1948 following the marriage of the Plaintiff-Appellant Dorothea Donohue and her husband William Donohue; they lived first in

Liberty, New York located in Sullivan County for two years and that was followed by uninterrupted residence, first in Long Island City where Mr. Donohue first became a member of Local 15, International Union of Operating Engineers and out of which union Mr. Donohue worked continuously for over 20 years within the five Borough of the City of New York which is the territorial jurisdiction of Local 15;

(2) the domicile of the Plaintiffs-Appellants and their family first at 170 West 89th Street, New York City for a period of ten years and then at 120 West 91st Street, New York City, for a period of eight years, totalling over eighteen years;

(3) the attendance of most of the children of the Donohue family at St. Gregory's Church and Parochial School where practically all graduated with the exception of the infant Plaintiff-Appellant Dawn who attended P.S. 84 on West 91st Street, Manhattan, completing two grades and returning to the third grade in September 1973 after her accident of July 29, 1973 and remaining in P.S. 84 until November 1973 when the mother and Dawn removed to Oceangrove, New Jersey, to be near Doctor Jasaitis;

(4) the letter from Mrs. Donohue postmarked March 5, 1975 to William J. Corcoran, Esq., her attorney, in which she states that the doctor's schedule requires her and Dawn to remain temporarily in New Jersey and of her intent to return to New York. This letter has great probity for the reason that it was written and postmarked on March 5, 1975 a day before the U. S. Marshall had served a summons and complaint on the Defendant-Appellee on March 6, 1975. In other words, the letter and its contents were sent at a point in time prior to the Defendant-Appellee knowing that the action would be commenced in the Federal Court in New York with its

answer containing the defense of lack of jurisdiction; the Plaintiffs-Appellants were not aware in point of time of this defense so as to prepare a reply or defense to it;

(5) the fact that the Plaintiffs-Appellants nor Mr. Donohue ever worked in New Jersey;

(6) on the contrary the Plaintiff-Appellant Dorothea Donohue and her husband always voted in New York and the Plaintiff-Appellant, Dorothea Donohue was a member of her Election Board in her District in West 90th Street, Manhattan.

A further guideline as to the domicile of a party, as expressed in intent is the case of *Williamson* v. *Osenton*, 232 U.S. 619 (1914) where the Supreme Court held

> "the absence of any present intention of not residing permanently or indefinitely in the new abode."

POINT III

Absent proof showing a change of intent the domicile of the Plaintiffs-Appellants in New York continues notwithstanding temporary residence in New Jersey where such New Jersey residence is explained.

The life style of the Plaintiffs-Appellants is shown to be overwhelmingly that of "New York". Following the marriage of the Plaintiff-Appellant Dorothea Donohue to her husband, the parties resided in Sullivan County, New York for 2 years; thereafter it was followed by a brief residence in Queens County of two years where the husband joined Local 15 of the Operating Engineers Union; thereafter the parents of the infant Plaintiff-Appellant Dawn resided in the West Side of Manhattan, namely 90th and 91st Streets for over 18 years; this residence continued after the injury to Dawn on July 29, 1973.

If there was no accident to Dawn, the life style of the parents and the infant Plaintiff-Appellant would be physically that of the West Side of Manhattan where the roots of the family were firmly established, by lease of the apartment in the Stephen Wise Towers of the New York City Housing Authority on West 91st Street; by attendance at St. Gregory's Church and School for most of the children except Dawn who attended P.S. 84 on West 91st Street; the affiliation of the father with Local Union 15 of the International Union of Operating Engineers located at 265 West 14th Street, Manhattan, out of which Union the husband was gainfully employed for over 20 years. This employment record is further supported by the fact that the medical and hospital bills of the infant Plaintiff-Appellant Dawn were paid by the Joint Welfare Fund of the International Union of Operating Engineers, Locals 14-15. Affiliation with Local 15 did not permit the father to work or seek work in New Jersey or other union territory of the Operating Engineers Union.

With the uncontradicted history and life style covering a period of over 20 years, with strong roots firmly established, showing the West Side of Manhattan to be the domicile of the parents and where the Plaintiff-Appellant Dorothea Donohue was a member of the Local Election Board, is there any reason for the Plaintiffs-Appellants to change their domicile. No proof was offered showing such an intent. On the contrary, there is a continuing intent on the part of the Plaintiffs-Appellants to return to New York when the necessary operative procedures would be completed.

The Plaintiffs-Appellants were not shown to be migrants in their life style; on the contrary in over 20 years they resided at two addresses, a few blocks from each other. In going to New Jersey, the Plaintiffs-Appellants were new with no roots and no prospects of employment

on the part of the husband and father, William Donohue, who continued working in New York City for almost four months after his daughter's injury; Mr. Donohue retired on disability at this time and has since been confined to the hospital to the present time. If there were work opportunities for the husband, there might be a motivating reason to change his domicile to New Jersey. There were no work opportunities for Mr. Donohue nor did they seek them. In December 1973 Mr. Donohue was retired from his Union and confined to a hospital, so that motivation from that angle is not present.

There was no motivation for the children to change from the school in Manhattan to attend school in New Jersey where they were not known and where they had never been. As a matter of fact when Dawn enrolled in the New Jersey School, despite the fact that she completed Grade 2 in P.S. 84 in Manhattan, she had to repeat Grade 2 in the new school. Would that be a motivating reason? Hardly. One does not change domicile and go to another State, particularly when the child would have to repeat the Grade which she had completed in New York. The obvious intent would be to stay away from New Jersey where the penalty of repeating the Grade would be necessary for enrollment.

The family had a home in the New York City Housing Authority project known as the Stephen Wise Towers on West 91st Street and to which neighborhood the parents of the infant plaintiff were accustomed for over 20 years. Was there any motivating reason to change, such as lower rent, etc.? No proof was offered to support such a predicate.

Would a family consisting of the parents and two young children pick up stakes and move to a place where they were never there before and where they had no friends or relatives? Hardly. Intent would be just the other

way. Would there be an attraction to attend superior schools in New Jersey for the children? Hardly. Particularly, where the other children in the family had all graduated from St. Gregory's School, been baptized and confirmed there, with Patricia the next youngest still in St. Gregory's? Would Mrs. Donohue be induced to move to New Jersey for political reasons, when she was a member of the Local Election Board in her neighborhood? Hardly. There is a complete lack of proof to show that the family intended to make New Jersey its permanent domicile. Absent this proof, the domicile of the parents continued to be that of New York notwithstanding the temporary residence of the Plaintiffs-Appellants in New Jersey.

Good and cogent reasons are advanced to justify the temporray residence in New Jersey. It was to be near Dr. Jasaitis whom the Mother regarded as a "miracle" doctor, who was providentially in the hospital when Dawn was admitted and who turned out to be a specialist in one surgical area, namely "surgery and reconstruction of the hand". This dedicated doctor who attended Dawn during the difficult period when she returned to school and was the butt of her schoolmates' gibes who described her having a "claw" hand, was the sole reason why the Plaintiffs-Appellants moved to New Jersey in November 1973, after (1) Dawn was enrolled in P.S. 84 in Manhattan, (2) after Patricia was enrolled in St. Gregory's Parochial School, (3) after the father retired from New York employment in November in 1973 due to permanent and total disability. Although the mother took Dawn regularly to Dr. Jasaitis' office for follow-up therapy treatments upon her discharge from the Hospital in July through November 1973, the costs of travel and inconvenience were too great to await the second operation which Dr. Jasaitis predicted would be necessary if Dawn was to get better results from the first operation.

The absence of any proof showing change of intent to make New Jersey their domicile and the good and substantial reasons given to justify the temporary residence in New Jersey makes the decision of Judge Pollack that the Plaintiffs-Appellants became residents and citizens of New Jersey without warrant in fact or law. The proof is altogether the opposite.

POINT IV

The absence of intention to go elsewhere is controlling on the question of domicile.

The Third Circuit, Court of Appeals, in the case of *Gallagher* v. *Philadelphia Transportation Co., supra,* held that "the negatively stated proposition is correct, viz: that it is the absence of an intention to go elsewhere which is controlling." (page 546).

In the case at bar, not one scintilla of evidence is offered to show an intention "to go elsewhere" on the part of the Plaintiffs-Appellants. Put in a negative proposition, the proof of close attachment covering a period of over twenty years and which proof included voting, working in New York City, attendance at schools in New York City, attendance at churches in New York City, all clearly establish "the absence of intention to go elsewhere".

The answers to the finely tuned questions of the Interrogatories and in the detailed deposition to which the Plaintiff-Appellant, Dorothea Donohue, was subjected to, all demonstrated evidence of "the absence of an intention to go elsewhere". Indeed, after such probing in depth by way of the interrogatories and depositions, skilled counsel for the Defendant-Appellee were unsuccessful in fingering the slightest clue to offset "the absence of an intention to go elsewhere". The guidelines of Judge Edelstein apply in

the case of *Broadstone Realty Corp.* v. *Thomas Mellon Evans, supra* where he says at Page 265

> "A person may have several residences and can change his residence at will but domicile, once established, so remains until a new domicile is legally acquired."

Also,

> "The acquisition of a new residence for occupancy during employment away from a permanent nome is insufficient to rebut that presumption * * *."

Likewise, the residence of the Plaintiffs-Appellants in the case at bar in the State of New Jersey to be in close proximity to the attending surgeon, does not negate "the absence of an intention to go elsewhere".

CONCLUSION

Wherefore, it is respectfully prayed that the decision and order of Judge Pollack be reversed and the case remanded to the District Court for trial and further disposition.

Respectfully submitted,

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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

THE UNITED STATES COURT O F APPEALS

DONOHUE

VS

RAPELLA

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF **N.Y.** , ss:

AFRIM HASKAJ being duly sworn,

deposes and says that he is over the age of **18** years and resides at **1482 42nd street Broklyn**

That on the **13th** day of **february, 1976** 19 at

he served the annexed **joint appendix and brief submitted fo plaintiffs-appellants** upon **arbarini, Scher, DeCicco, & Berardino, att'y s for def-appellee, 500 Fith N.Y, N.Y.** in this action, by delivering to and leaving with said **attorneys** true cop thereof.

two

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this **13**
day of **february, 1976** 19

Afrim Haskaj

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975